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No. 87-121

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections, and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida

Petitioners,

v.

AUBREY DENNIS ADAMS, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OPPOSITION TO THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI

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August 19, 1987

Counterstatement of Questions Presented

1. Whether certiorari should be granted on the basis of purported conflicts on a federal question, where one supposed conflict concerns a state court which did not decide any federal question and the other asserted conflict concerns dictum or an alternative holding in a wholly different context?

2. Whether certiorari should be granted on the basis of the assertion that the Eleventh Circuit failed to follow this Court's precedents, where the Eleventh Circuit specifically did consider and follow those precedents?

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REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT ON A FEDERAL QUESTION WITH ANY HOLDING OF THE FLORIDA SUPREME COURT OR THE FIFTH CIRCUIT

Petitioners' principal contention in their certiorari petition is that there is a conflict on a

federal question between (a) the Eleventh Circuit's holding that it could reach the merits of Mr. Adams' Caldwell claim and (b) holdings of the Florida Supreme Court and the Fifth Circuit. (Petition 12-21.)[1] However, there is no such conflict.

A. The Florida Supreme Court Has Not Rendered Any Decision On the Federal Questions Which Petitioners Seek To Raise Here

The Florida Supreme Court decisions which Petitioners cite (Petition at 13), Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987), and Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987), do not make any holding on the federal questions on which Petitioners are seeking certiorari. Those questions are whether the federal courts are precluded from considering Mr. Adams' Caldwell claim by the "cause and prejudice" test intitially set forth in Wainwright v. Sykes, 433 U.S. 72 (1977), or because Mr. Adams has allegedly abused the writ of federal habeas corpus.

The Florida Supreme Court merely held that, for state law procedural reasons, it would not decide two

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1 References to "Petition ____-____" are to pages in Petitioners' Petition For A Writ Of Certiorari in the instant case.

particular Caldwell claims. It did not make, and could not have made, any holding on whether a federal habeas corpus court would later be precluded under federal law from reaching the merits of Caldwell claims. Since the Florida Supreme Court has made no holding regarding either the Wainwright v. Sykes issue or the abuse of the writ issue, its decisions provide no basis for granting the writ of certiorari on those issues here.

B. The Fifth Circuit's Dictum Or Alternative Holding In A Very Different Context Provides No Basis For Granting Certiorari

The holding in the Fifth Circuit case cited by Petitioners (see Petition 17-21), Moore v. Blackburn, 774 F.2d 97, 98 (5th Cir. 1985), cert. denied, 105 S.Ct. 2904 (1986), is also not in conflict with the Eleventh Circuit's holding that it could reach the merits of Mr. Adams' Caldwell claim. In Moore, the Fifth Circuit held that Rule 9(b) of the Rules Governing Section 2254 Cases and the principles set forth in Sanders v. United States, 373 U.S. 1 (1963), barred Mr. Moore from raising successively the same constitutional attack on the prosecutor's closing argument that he had unsuccessfully litigated prior to this Court's decision in Caldwell. That holding does not conflict with the Eleventh Circuit's decision in

the instant case, which concerns a successor, not successive, petition.

The Fifth Circuit's one-page decision in Moore went on to discuss, in what is either pure dictum or at most an alternative holding, what it would have done if it had decided that the prosecutorial argument issue were being raised for the first time. The Fifth Circuit stated that in that hypothetical event, it would have considered the raising of that claim to have been an abuse of the writ. Id.

Even if such dictum or alternative holding were in opposition to the Eleventh Circuit's holding in Mr. Adams' case, it would not create a clear conflict under Supreme Court Rule 17.1(a). See Estreicher & Sexton, Managerial Theory Of The Supreme Court, 59 N.Y.U. L. Rev. 681, 722-23 (1984). Dictum or an alternative holding may not result from "the same thorough deliberation" as an actual holding. Id. Moreover,

> "The federal courts of appeals and state supreme courts should be permitted -- indeed, encouraged, to consider dicta or alternative holdings in light of emerging conflicting signals from other courts. This not only relieves the Supreme Court of the burden of unnecessarily resolving conflicts that may be resolved below, but it also emphasizes the responsibility of the lower courts to reconcile differences where possible, preserving their contrary positions only in cases truly calling for Supreme Court intervention. * * *"

Id. (footnotes omitted).

In any event, it is far from certain that the dictum or alternative holding in Moore is opposed to the Eleventh Circuit's holding in Mr. Adams' case. Whereas prosecutorial closing arguments such as that in Moore had been challenged under the Eighth Amendment prior to this Court's decision in Caldwell, no one had ever raised an Eighth Amendment challenge prior to Caldwell to jury instructions concerning the jury's role under Florida's new capital sentencing system, in which judicial overrides of juries are sometimes possible. See Adams v. Wainwright, 816 F.2d 1493, 1499-1500 (11th Cir. 1987). Hence, it is by no means clear that the Fifth Circuit would disagree with the Eleventh Circuit's decision to reach the merits in Mr. Adams' case.

Petitioners' claim that there is a conflict between the Fifth and Tenth Circuits is also incorrect. The Tenth Circuit case which Petitioners cite, Dutton v. Brown, 812 F.2d 593, 596 (10th Cir. 1987) (en banc), concerned the Wainwright v. Sykes "cause and prejudice" test for procedural default. It did not present any issue regarding either a successive or successor petition, and thus is not in conflict with the Fifth Cir-

cuit's actual holding, dictum or alternative holding in Moore.

II.

THE ELEVENTH CIRCUIT EXPLICITLY FOLLOWED THIS COURT'S PRECEDENTS IN CONSIDERING BOTH CAUSE AND PREJUDICE

Petitioners make a series of unsupported assertions that the Eleventh Circuit failed to follow this Court's holdings concerning "cause" and "prejudice." (See Petition 20-27.) These assertions are not only patently incorrect. They also proceed from the erroneous premise that the threshhold for applying the "cause and prejudice" test was satisfied here.

The Eleventh Circuit held that the Florida Supreme Court's decision either was based on an erroneous view of the merits of Mr. Adams' constitutional claim or constituted "application of a procedural bar with regard to a type of claim that Florida does not regularly and consistently bar." Adams, supra, 816 F.2d at 1497. Accord, Wheat v. Thigpen, 793 F.2d 621, 625-27 (5th Cir. 1986), cert. denied, 107 S.Ct. 1566 (1987). Thus, the Eleventh Circuit decided to reach the merits on independent grounds before applying the "cause and prejudice" test. Accordingly, even if the Eleventh Circuit's appli-

cation of the "cause and prejudice" test were as erroneous as Petitioners maintain, there would be no basis for granting the petition here.

In any event, Chief Judge Roney and Judges Fay and Johnson did not cavalierly ignore this Court's precedents when they considered "cause" and "prejudice". Their conclusion that there was "cause" for Mr. Adams' not having presented an Eighth Amendment attack on the jury instructions prior to Caldwell is fully in accord with this Court's holdings in Reed v. Ross, 468 U.S. 1, 16 (1986), and Smith v. Murray, 106 S.Ct. 2661, 2667-68 (1986). Indeed, both of those holdings are discussed in the Eleventh Circuit's decision.

Moreover, there is simply no basis for Petitioners' suggestion that the Eleventh Circuit utilized a "deliberate bypass" standard or premised its "cause" ruling upon failings of Mr. Adams' counsel. Instead, the Eleventh Circuit engaged in a careful analysis, in the course of which it pointed out that the "state has not cited to, nor have we found, any decisions indicating that this type of Eighth Amendment claim was being raised" prior to Caldwell in cases involving a possible judicial override of the jury. Adams, supra, 816 F.2d at 1497-1500. Unlike Smith v. Murray, supra, where various

forms of a claim were "percolating" in the lower courts and an amicus had raised that claim in that very case, "the fact no one was raising the claim Adams now raises at the time of his trial and appeal certainly is an indication that the claim was so novel as to have no reasonable basis in existing precedent." Adams, supra, 816 F.2d at 1500.

Finally, the Eleventh Circuit, far from assuming prejudice, as Petitioners assert, specifically addressed the "prejudice" issue in a lengthy footnote as well as in the text. See Adams, supra, at 1501 & n.9. In this analysis, the Eleventh Circuit considered the trial judge's numerous egregiously misleading statements about the jury's role in the context of the judge's other instructions and the trial as a whole. It concluded that the judge "left the jury with a false impression as to the significance of its role in the sentencing process." Id.

Thus, Petitioners' ad hominem attacks on the distinguished Eleventh Circuit panel which decided this case are meritless. Despite Petitioners' strenuous efforts to secure en banc review of the unanimous holding rendered by Chief Judge Roney and Judges Fay and Johnson, not a single member of the Eleventh Circuit suggested

such review. Petitioners' extreme unhappiness with the Eleventh Circuit's decision provides no more basis for granting review by certiorari here than it did for granting en banc review.

CONCLUSION

For the reasons set forth above, the petition for the granting of a writ of certiorari should be denied.

Dated: August 19, 1987

Respectfully submitted,

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AFFIDAVIT OF MAILING

I, RONALD J. TABAK, counsel of record for Aubrey Dennis Adams, Jr., Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of August 1987, within the time permitted for filing, I caused to be deposited in the United States mail, with first-class postage prepaid, one original and nine copies of the foregoing Opposition To The Granting Of The Petition For Writ of Certiorari, addressed to the Clerk of the Supreme Court of the United States.

Ronald J. Tabak

Ronald J. Tabak

Subscribed and Sworn to
before me, a Notary Public
at New York, New York this
19th day of August 1987.

William B. Kanner

Notary Public

WILLIAM B. KONNER
Notary Public, State of New York
No. 31-4767830
Qualified in New York County
Commission Expires Aug. 31, 1988

CERTIFICATE OF SERVICE

I, RONALD J. TABAK, counsel of record for Aubrey Dennis Adams, Jr., Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this 19th day of August 1987 served upon the Petitioners a true and correct copy of the foregoing Opposition To The Granting Of The Petition For Writ of Certiorari, by causing a copy of the same to be deposited in the United States mail with proper address and with adequate postage prepaid to: Margene A. Roper, Esq., Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014.

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